

Michael L. Snider of Wichita, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for the respondent and its insurance carrier. Cortland Q. Clotfelter of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award dated August 31, 1994, entered by Administrative Law Judge Shannon S. Krysl.

ISSUES

By its unpublished decision filed June 27, 1997, the Court of Appeals remanded this case to the Appeals Board to determine the appropriate date of accident. Therefore, the only issues now before the Appeals Board are:

- (1) For computation purposes, what is the appropriate date of accident for this repetitive trauma injury?
- (2) Which permanent partial disability formula applies to this accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

In April 1993, claimant filed a workers compensation claim for injuries to both upper extremities and alleged a period of accident from August 26, 1992, through each day worked thereafter. At both the regular hearing and in his submission letter, claimant alleged the period of accident to be from August 26, 1992, through August 31, 1993, the date claimant was laid off.

In their original submission letters the parties did not specifically make date of accident an issue to be determined by the Administrative Law Judge. Therefore, the Administrative Law Judge did not address that issue in the Award entered August 31, 1994. The Judge awarded claimant permanent partial general disability benefits for a 40 percent work disability for an accidental injury sustained on August 31, 1993. (See page 10 of the Award.) However, the Judge utilized the permanent partial general disability formula for accidents occurring before July 1, 1993, rather than the formula for accidents occurring on or after that date.

The respondent and its insurance carrier appealed the August 31, 1994, Award to the Appeals Board. By Order dated October 4, 1995, the Appeals Board held the appropriate date of accident was August 31, 1993, in accordance with Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), and remanded the proceeding to the Administrative Law Judge to provide the parties an opportunity to present evidence relating to disability for an accident occurring on August 31, 1993, the date claimant was laid off work.

Claimant appealed the Appeals Board's October 1995 Order to the Court of Appeals. Finding that claimant left work because of a general layoff not related to his injuries, in its decision filed June 27, 1997, the Court of Appeals concluded the Appeals Board erred by finding August 31, 1993, as the date of accident as a matter of law pursuant to the Berry decision and ordered the Appeals Board to consider the date of accident issue on its merits and in light of the later decision of Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), which had not been decided when the Appeals Board entered its Order.

As indicated above, claimant alleges a date of accident from August 26, 1992, through August 31, 1993, the date of layoff. On July 1, 1993, K.S.A. 44-510e was amended to change the formula to determine permanent partial general disability benefits. However, the Appeals Board recognizes that neither the amendments nor case law in existence at the time the parties submitted their evidence addressed the manner to determine the appropriate date of accident (and thus the appropriate permanent partial general disability formula) for repetitive injury accidents which began before K.S.A. 44-510e was changed on July 1, 1993, but ended after that date.

At oral argument both claimant's and respondent's counsel represented that they neither stipulated to the appropriate date of accident for computation purposes nor to the permanent partial disability formula which should be used to compute claimant's benefits. Both counsel request the Appeals Board to remand this proceeding to the Administrative Law Judge to determine the appropriate date of accident and appropriate award.

Because claimant's date of accident was not addressed by the Administrative Law Judge and because the parties should be afforded the opportunity, if they desire, to present evidence relating to disability for a potential date of accident on or after July 1, 1993, the Appeals Board finds this case should be remanded to the Administrative Law Judge to (1) reopen the record, (2) provide the parties a reasonable opportunity to present additional evidence, and (3) determine the appropriate date of accident and award of benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this proceeding should be, and hereby is, remanded to the Administrative Law Judge to reopen the record, provide the parties a reasonable opportunity to present additional evidence, and decide the appropriate date of accident and award. The Appeals Board does not retain jurisdiction over this proceeding.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Frederick L. Haag, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
Administrative Law Judge, Wichita, KS
Philip S. Harness, Director